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No. 344

In the Supreme Court of the United States

OCTOBER TERM, 1957

HARRY J. ALKER, JR., PETITIONER

v.

GEORGE M. HUMPHREY, SECRETARY OF THE TREASURY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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Kingsland v. *Dorsey*, 338 U.S. 318 — 8
National Council of American-Soviet F. v. *Brownell*, 243 F. 2d 222 — 8
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OPINIONS BELOW

The order of the District Court for the District of Columbia, granting respondent's motion for summary judgment, is not reported (R. 12).[1] The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 1a-2a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1957 (Pet. 1a). On July 10, 1957, the time to file a petition for certiorari was extended to

[1] All record references (designated "R.") are to the "Joint Appendix" attached to petitioner's brief in the court below and filed by petitioner in this Court.

July 30, 1957 and, on August 2, 1957, it was further extended to August 5, 1957. The petition for a writ of certiorari was filed on August 5, 1957. Jurisdiction of this Court is improperly invoked by petitioner under 28 U.S.C. 1291 but apparently rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of the present case, both courts below correctly held that the denial of petitioner's application for a further continuance of an administrative disbarment proceeding did not constitute an abuse of discretion.

STATUTE INVOLVED

The Act of July 7, 1884, 23 Stat. 258, 5 U.S.C. 261, provides:

> § 261. Rules for government of agents representing claimants. The Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department, and may require of such persons, agents, and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. And such Secretary may after due notice and opportunity for hearing suspend, and disbar from further practice be-

fore his department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement.

STATEMENT

Petitioner, a practicing attorney and member of the Pennsylvania bar, was "disbarred from further practice before the Treasury Department", effective February 28, 1956 (R. 31). The present suit for injunctive relief, seeking to set aside the disbarment order, was then filed (R. 1-5).

A. The Disbarment Proceeding.

On December 16, 1953, the Director of Practice in the Treasury Department filed a detailed Statement of Charges, constituting "grounds for disbarment" of petitioner (R. 37, 44). The Director charged, *inter alia*, that in 1952 petitioner had falsely stated to the Treasury Department that he had filed personal income tax returns for 1946, 1949, 1950; that he had falsified a personal return by "stating that $3,643.11 had been paid by payments on the 1949 Declaration of Estimated Tax, when in truth no payment had been so made"; that he filed and prepared returns for others, "Knowing the deductions [claimed thereon] to be false"; that he had hindered and unreasonably delayed several tax liability investigations conducted by the Internal Revenue Service; and that in various matters he had threatened an Internal Revenue Spe-

cial Agent with "the use of influence in Washington" (R. 37-44).

After being served with these charges, petitioner requested and was furnished with "a Bill of Particulars" to help him "prepare properly his defense" (Pet. 2). On February 24, 1954, he filed an answer, denying the charges.

A hearing on the charges was originally scheduled for March 16, 1954, before a Treasury Department hearing examiner in Philadelphia, but was deferred at petitioner's request to March 30, 1954. After being set down for pre-trial conference on April 6, 1954, the hearing was late. "put off for another six weeks" because of petitioner's illness and the unavailability of counsel and set, at petitioner's request, for Monday, May 17, 1954 (R. 26). Subsequently, after a still further request by petitioner, the May 17, 1954 date was postponed by the examiner and the "hearing was finally fixed for May 20, 1954" (Pet. 3).

On May 18, 1954, petitioner, again asserting he was ill and unable to appear, requested a still further extension beyond the May 20, 1954 date. The examiner, on May 20, 1954, held a hearing on the request for a continuance. At the hearing, petitioner's doctor testified that petitioner was too ill to attend. Two dentists, also testifying on petitioner's behalf, described the poor condition of his teeth. In rebuttal, several special agents of the Internal Revenue Service testified. Their testimony established that petitioner had worked on Thursday, May 13, 1954; that the following day he transacted business at an Internal Revenue Service Office; that on Mon-

day, May 17, 1954, he was in the United States Tax Court in Philadelphia when "court opened at ten o'clock," (R. 22) and that he was in his office building on Tuesday, May 18 (R. 13-24).

After hearing this testimony, the examiner, concluding that petitioner's motion for a further continuance "was not in good faith * * * that he had had, over and over again, opportunity to be heard * * * but that he shunted same, and would as long as possible, if not always, continue to do so," denied the motion (R. 33; 35). The examiner accordingly notified the parties that the hearing on the charges would proceed the following morning, May 21, 1954. Petitioner was advised that his defense witnesses could be presented even if he were absent; that he could wait and testify by deposition at such time as all the oral testimony was in or at any other time convenient to him; and that his answer to the charges could be admitted into the record with a stipulation that petitioner would so testify if present (R. 27).

Petitioner rejected all of these opportunities to present his position. On May 21, 1954, neither he nor his counsel appeared at the hearing at which eighteen witnesses testified in support of the disbarment charges (Pet. App. 2a). At the conclusion of the hearing, the examiner wrote to petitioner again "offering him an opportunity to produce witnesses or evidence or to take depositions" (Pet. App. 2a).

In August, 1954, copies of the transcript of the hearing and exhibits were furnished to petitioner. The Director of Practice then submitted to the examiner proposed findings, conclusions and a support-

ing brief. Copies of these were also furnished to petitioner. In October and December 1954, petitioner filed his exceptions and briefs (R. 8).

On March 2, 1955, the examiner recommended disbarment (R. 37). Petitioner appealed to the Secretary of Treasury. On January 31, 1956, the Secretary ruled that "on the record before him, it must be concluded that the Examiner acted reasonably in denying the motion" for continuance (R. 9). However, after noting petitioner's contention that he should be afforded an "opportunity in a hearing to disprove the charges," the Secretary stated that he was "prepared to grant" petitioner another opportunity if the resultant delay does not prejudice the interests of the Government (R. 9). Accordingly, the Secretary ruled that petitioner could have another opportunity for a hearing providing he requested it in writing and consented to a temporary suspension from practice before the Treasury Department pending final determination of the disbarment proceeding (R. 9). Petitioner did not request the proffered hearing and on February 28, 1956, the order of disbarment was entered by the Department (R. 31).

B. The Present Litigation.

Petitioner filed the present complaint against Secretary of the Treasury Humphrey [2] in the United

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[2] Humphrey resigned and was succeeded by Secretary of the Treasury Anderson on July 29, 1957. But the petition for certiorari, filed August 5, 1957, names the former incumbent as respondent here. See Rule 48 (3), Revised Rules of this Court.

States District Court for the District of Columbia, seeking to set aside the disbarment order (R. 1-5). The District Court granted the Government's motion for summary judgment, based on the record of the administrative disbarment proceedings (R. 11-12). The Court of Appeals affirmed *per curiam* noting that the record does not support petitioner's arguments that he had been denied a fair hearing or that the examiner abused his discretion in denying a continuance beyond May 20, 1954 (Pet. App. 2a).

ARGUMENT

Petitioner's principal contention is that the trial examiner abused his discretion in refusing to grant a further continuance beyond May 20, 1954. But both courts below—in addition to the Secretary of Treasury—reviewed the pertinent facts and found that there was no such abuse. These concurrent factual findings, fully substantiated by the testimony presented before the examiner on the motion for continuance, need not and, we submit, should not be again reviewed here.

Certiorari is not warranted here for the further reason that any error claimed in the refusal to continue did not prejudice petitioner or prevent him from fully presenting his defense. The statute under which petitioner was barred from further practice before the Treasury Department simply requires that he be given "due notice and opportunity for hearing." Act of July 7, 1884, *supra*, p. 2. Similarly, due process requires no more than that the accused attorney in an administrative disbarment proceeding be given

fair and ample opportunity to explain and defend his conduct. *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, 123; *Kingsland* v. *Dorsey*, 338 U.S. 318; Cf. *Ex parte Wall*, 107 U.S. 265, 288-289; *Selling* v. *Radford*, 243 U.S. 46; *Theard* v. *United States*, 354 U.S. 278, 282. That petitioner was afforded such an opportunity is not open to serious challenge. Wholly apart from the oral hearing attacked here because of the examiner's refusal to grant an additional postponement, there were numerous additional opportunities given to petitioner to present his defense. *Supra*, pp. 5-6. Thus, petitioner was given specific charges and a detailed bill of particulars. He was advised that he could testify by deposition [3] during or after the oral hearing and before or after the examiner's decision. He was even offered an oral hearing after his appeal to the Secretary of Treasury. Having rejected all of these opportunities to present his defense, petitioner cannot now complain. Indeed, his refusal to exhaust his administrative remedies and opportunities destroys any right he might otherwise have had to judicial relief. *National Council of American-Soviet F.* v. *Brownell*, 243 F. 2d 222, 225 (C.A.D.C.); see *Yakus* v. *United States*, 321 U.S. 414, 434; *United States* v. *Holpuch Co.*, 328 U.S. 234, 240.

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[3] Due process certainly does not require either an oral hearing or the accused attorney's personal attendance at the hearing. *Selling* v. *Radford*, 243 U.S. 46, 51-52, shows that it is sufficient to allow an attorney to present his objections to disbarment in a printed brief.

Petitioner attempts to justify his failure to accept the Secretary's post-appeal offer of a hearing on the ground that it was conditioned on a temporary suspension of his license to practice before the Treasury Department. But this condition, found by the Secretary to be essential to protection of the public interest, was plainly valid. The information then before the Secretary fully justified a summary suspension pending a further opportunity to petitioner to show cause why he should not be permanently disbarred. In any event, petitioner's explanation of his refusal of the Secretary's post-appeal offer applies only to that particular offer and to none of the several, earlier and unconditional invitations to him to present his defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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